IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

EDWIN T. MORRIS,
EDLAR B. BLANTON,
WILLIAM G. MAXWELL,
PHILLIP S. WITHERSPOON,
ISAAC H HARNESS,
THOMAS PEERY,
R. L. GLOVER,
J. B. SPRAGINS,
C. M. KEYS,
MILTON F. IKARD.
APPELLANTS.

vs.

ETHAN A. HITCHCOCK,
WILLIAM A. JONES,
J. GEORGE WRIGHT,
J. BLAIR SHOENFELT.
APPELLEES.

No.....

APPEAL FROM THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANTS.

STATEMENT.

On May 3rd, 1902, there was enacted by the Legislature for the Chickasaw Tribe of Indians a Statute entitled "An act to prescribe privilege or permit taxes and defining the manner of their collection." The act, in substance, provides that upon all live stock held in the Chickasaw Nation by non-citizens there should be paid annually a tax of twenty-

five cents per head on cattle, horses and mules and five cents per head on sheep and goats, payable to such person or persons and collected under such rules and regulations as may be prescribed by the Secretary of the Interior, the expense to be deducted from the gross collections and the net balance paid quarterly to the Treasurer of the Chickasaw Nation. If the taxes are not paid when demanded, such live stock to be considered in the Chickasaw Nation without its consent and unlawfully upon the lands of the Chickasaws, and the presence of such stock and their owners or holders deemed detrimental to the peace and welfare of the Indians. This Statute was approved by the President on May 15th, 1902. The Honorable Thomas Ryan, acting Secretary of the Interior, on June 3rd, 1902, promulgated certain regulations for the enforcement of the above statute. These regulations, in substance, re-enact the statute and provide that the tax shall apply to all live stock held by any person other than a recognized citizen of the tribe; that the taxes should be paid to the Indian Agent at Muskogee annually on the 1st day of January prior to the introduction of such stock, and that the regulations and taxes should apply to all stock held within the limits of the Chickasaw Nation by other than recognized members of the tribe, whether held upon the public domain or upon lands leased from individual Indians.

The appellants are citizens of the United States having cattle and horses within the Chickasaw Nation upon lands leased from individual Indians and held by them as their approximate shares upon allotment.

The bulk of the cattle so owned by them were bred in the Chickasaw Nation and many of them acquired by purchase from members of the tribe, and none of such cattle were introduced into the Nation subsequent to January 1st, 1902.

The complaint was filed in the Supreme Court for the District of Columbia on August 19th, 1902, by the appellants sueing in their own behalf and in behalf of all owners of livestock similarly situated to enjoin the Secretary of the Interior, the Commissioner of Indian Affairs, the United States Indian Inspector and the United States Indian Agent at Muskogee from seizing and removing the cattle and horses of the appellants and other owners of live stock from the limits of the Chickasaw Nation for the nonpayment of said taxes. In the complaint the validity of the Chickasaw Statute, the regulations of the Interior Department and the seizure and removal of said cattle were called in question upon the grounds hereinafter assigned. The defendants appeared and demurred to the complaint upon the following grounds:

1st. The court has no jurisdiction over the subject matter of the suit.

2nd. There is a fatal defect of parties to the bill in that the Chickasaw Nation or tribe, nor any member or representative thereof, is not made a party thereto.

3rd. The bill of complaint is bad in substance and does not state facts sufficient to entitle the complainants, or either of them, to the relief prayed for or to any relief.

The court overruled the first and second demurrers, but sustained the third and dismissed the bill.

In sustaining the demurrer, the court held in substance that said Statute and regulations were valid and the threatened seizure and removal of the cattle a lawful exercise of authority upon the part of the Secretary of the Interior, but held that the bill was sufficient to entitle the plaintiffs to an injunction provided the threatened seizure and expulsion were unlawful. The case was appealed to the Court of Appeals for the District of Columbia, and was there affirmed in a written opinion substantially sustaining the opinion of the trial court; and the case has been appealed to this court.

ASSIGNMENT OF ERROR.

The appellants claim that the Court of Appeals for the District of Columbia in affirming said judgment committed error as follows:—

1st. In holding the Chickasaw Statute of May 3rd, 1902, to be valid, when the same should have been held invalid and void, because an encroachment upon the exclusive power of Congress under the Constitution to regulate commerce with the tribe.

2nd. In holding the Chickasaw Statute of May 3rd, 1902, to be valid, when the same should have been held invalid and void, as being a wrongful attempt upon the part of the Chickasaw Legislature to usurp legislative dominion and jurisdiction over the persons and property of citizens of the United States not members of the tribe, which jurisdiction the tribe does not, and never did, possess.

3rd. In holding the regulations promulgated by the Honorable Thomas Ryan on June 3rd, 1902, in behalf of the Interior Department, to be valid, when the same should have been held to be invalid and void, as a wrongful attempt upon the part of an executive officer to usurp power of legislation vested alone in Congress.

4th. In holding said Chickasaw Statute of May 3rd, 1902, and said regulations of June 3rd, 1902, as valid, when the same should have been held invalid and void, because repugnant to the Fourth and Fifth Amendments to the Constitution of the United States.

5th. In holding that the provisions of the Treaties of 1855 and 1866 with the Choctaw and Chickasaw Indians in reference to intruders are still in force, and not superseded or abrogated by the Atoka Agreement and the Curtis Bill and other subsequent legislation inconsistent therewith conferring upon citizens of the United States, not members of the Chickasaw Tribe, the right to reside and hold property in the Chickasaw Nation.

6th. In holding that Sections 2147 and 2149 of the Revised Statutes are still in force and applicable to conditions existing in the Chickasaw Nation.

7th. In holding that Sections 2147 and 2149 of the Revised Statutes are valid, when the same should have been held to be invalid, and repugnant to the Fourth and Fifth Amendments to the Constitution of the United States.

8th. In holding that said regulations of June 3rd, 1902, are not inconsistent with Section 2117 of the Revised Statutes, in which Congress expressed its will upon the subject, and prescribed the procedure.

9th. In holding that the Secretary of the Interior, an executive officer of the United States deriving all of his authority under its laws, has the right or power as such to enforce the Chickasaw Statute of May 3rd, 1902.

10th. In not holding that the Act of Congress knows as the Curtis Bill and the Atoka Agreement took from the tribe the control of the agricultural and grazing lands and conferred upon the individual Indian the right to the possession, use and enjoyment of his approximate share free from interference of the tribe in like manner as it took from the tribe the control of the mineral lands and placed them under the exclusive control of the Secretary of the Interior.

11th. In holding that Congress by Sections 2147 and 2149 of the Revised Statutes intended to confer, and did confer authority upon any of the officers therein named to seize or molest the cattle and horses of citizens of the United States.

12th. In holding the Chickasaw Statute of May 3rd, 1902, to be valid as a taxing measure, when the same should have been held to be invalid, because no assessment is provided for, and no lawful method for its enforcement is prescribed.

ARGUMENT.

The tribal government, we submit, has never had dominion or jurisdiction over citizens of the United States not members of the tribe, especially in matters relating to commerce, which Congress, under the Constitution, has exclusive right to regulate. When what are known as "The Five Civilized Tribes" crossed the Mississippi and settled in the Indian Territory, it was believed by both Indians and whites that the conditions then existing would remain practically the same for centuries to come. Owing to the building of railroads and unanticipated development of the country, conditions have been produced not contemplated at the time the Indian Territory was set apart as the future abode of the Indian tribes. At that time it was the policy of the government to exempt the Indians from national and state laws so long as they remained upon their reservations and confined themselves to dealings one with another. In other words, it was the policy of the government to allow the Indians to regulate their own domestic and social relations, but it has never been the policy of the government to concede to the Indians jurisdic-

tion and dominion over citizens of the United States. This policy of permitting the Indians to regulate their domestic and social affairs, while denying to them dominion of persons not belonging to the tribe, is shown in the Seventh and Fourteenth Articles of the Treaty with the Choctaws and Chickasaws of June 22nd, 1855.

"ARTICLE 7. So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property within their respective limits; *excepting, however, all persons, with their property, who are not by birth, adoption, or otherwise, citizens or members of either the Choctaw or Chickasaw tribe,* and all persons not being citizens *or* members of either tribe, found within their limits shall be considered intruders and be removed from and kept out of the same by the United States Indian Agent, assisted if necessary by the military, with the following exceptions, viz: such individuals as are or may be in the employment of the Government and their families; those peacefully travelling or temporarily sojourning in the country or trading therein, under licenses from the proper authority of the United States, and such as may be permitted by the Choctaws or Chickasaws, with the assent of the United States Agent, to reside within their limits, without becoming citizens or members of either of said tribes."

"ARTICLE 14. The United States shall protect the Choctaws and Chickasaws from domestic strife, from hostile invasion, and *from aggression by other Indians and white persons, not subject to their jurisdiction and laws;* and for all injuries resulting from such invasion or aggression full indemnity is hereby guaranteed to the party or parties injured, out of the Treasury of the United States, upon the

same principle and according to the same rules upon which white persons are entitled to indemnity for injuries or aggressions upon them, committed by Indians."

The same policy is indicated in Article 38 in the Treaty of 1866, as follows: "Every white person, who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw Nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, *and shall be subject to the laws of the Choctaw and Chickasaw Nations,* according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws in all respects as though he was a native Choctaw or Chickasaw."

Article 43 of the Treaty of 1866 contains substantially the same promise upon the part of the United States to protect the Indian from the intrusion of white persons as is contained in the Treaty of 1855; but it enlarges to some extent the exempted class. It will be seen that the United States, instead of conceding to the tribal governments jurisdiction of the person and property of citizens of the United States, reserved the right and assumed the duty by federal law to protect the Indians against the unlawful intrusion of those over whom jurisdiction was denied. What are known as the Intercourse Laws were enacted by Congress in discharge of the duty which it always assumed of protecting the Indians from the unlawful intrusion of the white man, because it has been deemed unwise to concede to the Indians jurisdiction, and thus invite strife and conflict between the white man and the Indian.

Prior to this controversy it had always been conceded that citizens of the United States found in the Indian Territory are subject to no law except the federal law, and amenable to the jurisdiction of no court except the federal court. The correctness of these views is conceded in the Chickasaw Statute under consideration. If the tribes have the power to impose the tax, they necessarily have the power to collect the same in an orderly and legal way. If the tribal legislature has the power to levy the tax, their courts and officers of necessity have the power to enforce its collection. This effort to invoke the aid of the Interior Department; the contention of the defendants that the approval of the Statute by the President makes it a presidential regulation; and the attempt to sustain the regulation under the authority conferred by the Statute upon the Secretary of the Interior to make rules and regulations not inconsistent with law, are all concessions that the Chickasaw Legislature does not have legislative dominion or jurisdiction over the person or property of a citizen of the United States not belonging to the tribe.

Attorney General Wirt, at an early day, held that the Cherokee Indians were without power to impose taxes or burdens upon white persons or their property situated within the boundaries of the tribe. He reached this conclusion from the provisions of the Treaty reserving to Congress the exclusive right to regulate commerce with the tribe, but he need not have gone to the treaty, for the Constitution of the United States contains substantially the same provision.

1st Opinion Attorney General, 645.

"The power to tax," says Mr. Cooley in his Principles of Constitutional Law, "is an incident of sovereignty and is co-extensive with the subjects to which that sovereignty extends." The power to tax, it is conceded, arises from the duty of protection; and the right of taxation and the duty of protection go hand in hand.

It is claimed that this tax is needed to maintain the tribal government and the Indian schools. None but Indians are subject to the tribal government, and none but Indian children can attend the schools. The so-called government and schools are maintained for the exclusive benefit of Indians. Those who enjoy the benefits of government should bear the burdens.

The Court of Appeals, without apparently intending to be sarcastic, speaks of non-citizens and their property being within the limits of the tribal government, enjoying its benefits and protection. It is not possible to point to the protection or benefit the non-citizen receives directly or indirectly from the tribal government. If it should be deemed necessary to tax the five hundred thousand white inhabitants of the Indian Territory to maintain tribal governments and schools, who should be the judge of the necessity for this tax and the amount of the same? What government has the power to impose burdens and restrictions and to regulate the conduct of white citizens of the United States in the Indian Territory? To what government do these citizens owe allegiance and duty? To what laws are they amenable? If these citizens are to be taxed, not for their own

benefit, but for the benefit of others, what power should prescribe the tax? Can it be said that these tribal governments can impose whatever burdens they deem fit upon men and their property, not belonging to the tribe; and that the Secretary of the Interior can coerce payment by whatever arbitrary methods he may be pleased to adopt? If these things can be done, there certainly exist remarkable conditions in the Indian Territory. If this tax be lawful, it is surrounded with none of the usual safe-guards. Those who impose the burden do not carry any part of it, and those who pay the tax receive no benefit. It is not a tax but spoliation.

See Arnd vs. Union Pac. R. R. Co., 120 Fed. 915.

But it is said the cattle and horses are upon the tribal lands without the consent of the tribe, and that this is an intrusion which the United States, under the provisions of the treaties, Supra, is under obligation to prevent.

Be this as it may. It is the province of Congress to enact laws and provide means for fulfilling the treaty obligations of the government. It is not for the Secretary of the Interior to say what is or is not an intrusion, and to abate it by any means he may see proper to adopt. Congress has enacted the laws, necessary in its judgment, to fulfill the treaty obligations. If the laws be deemed inadequate, an appeal should be made to Congress for additional legislation.

Under Section 2117 of the Revised Statutes, any person who drives or in any wise conveys any stock

of horses, mules or cattle to range or feed on land belonging to any Indian or tribe without the consent of such tribe is liable to a penalty of one dollar for each animal of such stock. Section 2124 provides that this penalty shall be sued for and recovered in an action in the nature of an action of debt.

This is a subject clearly pertaining to commerce, traffic or intercourse with the Indians. In the judgment of Congress, Section 2117 is adequate for the protection of the Indians against intrusion of live stock not belonging to members of the tribe. Now why is this Statute not adequate to accomplish the end desired? If deemed inadequate, from what source do the Secretary and tribal government derive their authority to supply its supposed deficiencies? The Statute says the owner shall incur a penalty of one dollar, to be recovered in an action of debt. The Secretary says, his cattle become subject to seizure by me, and I will put the owner and his cattle beyond the jurisdiction of the court where the penalty can not be recovered.

The defendants, in justifiction of their acts, cite Cherokee Nation vs. Hitchcock, 187 U. S. 294; but the case supports our position and does not sustain the contention of the defendants. That case is based upon the theory that while the title to the land is in the tribe, it is in trust for the people, and Congress has the unquestioned power to see that the trust is fulfilled; that it was a breach of this trust for the tribe to permit a few of the strong to monopolize and appropriate to their exclusive use the mineral, the grazing and agricultural lands of the Nation to the

exclusion of the weak and helpless, To remedy this evil, Congress, by the legislation known as The Curtis Bill, took from the tribe the control of the mineral lands, and provided that they should be leased by the Secretary of the Interior and the proceeds equally divided among the members. The case holds that this was a valid exercise of congressional power, and that the tribal government has no right to interfere. The Curtis Bill, in like manner, struck down the monopoly in agricultural and grazing lands.

Sections 16, 17, 18, 19, 23, 26 and 28, 30th Statute at Large, pp. 501-2-4-10 and 11, were intended to accomplish this purpose. The substance of these provisions is that each member of the tribe shall have the right to the use, possession and enjoyment of what would be his approximate share on allotment, together with the right to collect the rents and revenues thereon; that neither the tribe, nor any individual Indian, shall demand or receive anything by way of rents or royalties on land, saving the right of each Indian to collect the rents on his approximate share; that the courts of the United States in the Indian Territory shall have exclusive jurisdiction of all controversies growing out of the title, ownership, occupation, possession or use of real estate, coal and asphalt in the territory occupied by the Choctaw and Chickasaw Tribes. (p.511) And that the laws of the various tribes shall not be enforced at law or in equity by the courts of the United States. (Sec. 26) Congress could not have more effectually destroyed the monopoly of agricultural and grazing lands, or more thoroughly stripped the

tribal government of all control. The tribe can not collect rents and royalties and can not lease. Each individual has the unquestioned right to the use of his approximate share. The courts of the United States have exclusive jurisdiction, and there Indian Statutes can not be enforced. The agricultural and grazing lands are as far removed from the control of the tribe as the mineral lands. The tribe could as well impose taxes, burdens and restrictions upon the lessees of mineral from the Secretary of the Interior as upon the lessee of agricultural and grazing lands from the individual Indian. The right to impose taxes and restrictions would imply the right to prohibit.

The defendants say, however, that though the Chickasaw Statute of May 3rd, 1902, may be invalid, the appellents are estopped from questioning its validity, and cite Ferguson vs. Landram, 5 Bush (Ky,) 230, a conscript case, and People vs. Murray, et al, 5 Hill, 468, a mill dam case.

The appellants being in the Chickasaw Nation with their cattle lawfully grazing the same at the time of the enactment of the Statute, we can not see that any moral or legal ground for estoppel can arise.

"There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a state is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could

thus be a law in one case for one party, and not a law in another case for another party; a law today and not a law tomorrow; a law in one place and not a law in another in the same state. And whether it be a law or not a law is a judicial question to be settled and determined by the courts and judges. The doctrine of estoppel is totally anadmissible in the case." O'Brien vs. Wheelock, 184 U. S. 489.

We are also confronted with Corfield vs Coryell, Fed Cas., vol. 6, No. 3230, pp. 546,552, and McCready vs. Virginia, 94 U. S. 391, affirming the right of a state to pass discriminating laws in favor of her own citizens in reference to oyster beds and other like property belonging to all of the inhabitants of the state alike, and in which non-residents have no interest. These cases are not analogous to the one under consideration. The state, with a few exceptions defined in the Federal Constitution, has unquestioned dominion and jurisdiction of all persons and property within her boundaries, especially property held by the state in trust for the inhabitants. Of course, the state has the right to see that the owners of this common property receive the benefit of it, and to exclude those without interest from participating in its enjoyment. The Chickasaw Nation never did have jurisdiction of any one except members of the tribe, and its holding of the land in trust for the people has always been subject to the paramount control of Congress. Congress has practically abolished community ownership and partitioned the surface, thus giving to each individual Indian the right to the use and enjoyment of his

share, and abolishing the control of the tribe over the land.

The ownership of the land and the rights of the individual thereto and the rights of others to lease and to rent, are regulated by federal law, which the tribe can not repeal or modify. It is nonsense to speak of the appellants as claiming the right to participate on equal terms with the Indians in the use and enjoyment of their lands. No one claims any such right for the appellants. The Indian has the use and enjoyment of his approximate share, and still has such use and enjoyment when the appellants rent his land and pay him therefor. A tenant paying full value is in no sense a participant with the owner in the use and enjoyment of the estate.

If a state should attempt to prohibit an individual land owner from leasing or renting to a non-resident in disregard of the Constitution conferring upon Congress the right to regulate commerce among the several states, a question would arise more like the one under consideration.

Congress has not, and could not, delegate to the Secretary of the Interior Authority to impose taxes, and the regulations of the Secretary do not give to the Chickasaw Statute any additional force or validity.

It is now too well established to admit of discussion that Congress can neither confer legislative or judicial power upon an executive officer.

Kilbourn vs. Thompson, 103 U. S. 190.

The power to tax and the levy and apportionment of such taxes is a legislative function, which can not be delegated to an executive officer.

Cooley Principles of Constitutional Law, 103.

Stoutenburgh vs. Hennick, 129 U. S. 141.

Field vs. Clark, 143 U. S. 649.

United States vs. Eaton, 144 U. S. 677.

Neither the Secretary of the Interior, nor any of the other defendants, have the power to seize, to remove or molest the cattle and horses of the appellants, nor has Congress ever attempted to confer upon any of them such authority.

It will be seen the Secretary assumes the right, without the consent of the appellants, to impose such burdens as he pleases upon them, and to arbitrarily seize, remove and damage their property, and denies that they have any right to appeal to the court for protection or redress. The Secretary is law-maker, he is court and jury, he is the plaintiff and executioner. This is claimed to be due process of law. These are remarkable powers to be claimed by an executive officer, who is not mentioned in the Constitution but who derives all of his power, as well as his office, from the Statute.

It was well said by Lord Camden in Entick vs. Carrington, 19 Howell's State Trials, 1029: "The law which grants the power should be clear in proportion as the power is exorbitant." Here an officer claims the right to impose such taxes as he sees fit upon the white inhabitants of the Indian

Territory, and to coerce payment by any plan he may see fit to adopt.

These are remarkable powers to be claimed by an executive officer. If they exist, the law which confers them should be clear and precise, and its constitutionality should be unquestionable. Laws which thus invade the rights of the citizens are strictly construed, and the constitutional guaranties intended to protect the citizens against the oppression of those in power are to be liberally construed in favor of the citizens.

The defendants claim that the power is conferred by Section 2150.

"The military force of United States may be employed in such manner and under such regulations as the President may direct—

"First. In the apprehension of every person who may be in the Indian country in violation of law; and in conveying him immediately from the Indian country the nearest convenient and safe route to the civil authority of the territory or judicial district in which such person shall be found, to be proceeded against in due course of law;

Second. In the examination and seizure of stores, packages and boats authorized by law;

Third. In preventing the introduction of persons and property into the Indian country contrary to law; which persons and property shall be proceeded against according to law.

Fourth. And also in destroying or breaking up any distillery for manufacturing ardent spirits set up or maintained within the Indian country."

In determining the meaning of this section, we should consider Section 2133, forfeiting the goods of a trader who trades without license; Section 2137, which forfeits the property of one who hunts and

fishes unlawfully; Section 2141, authorizing the destruction of distilleries; as well as some other provisions looking to the forfeiture of property. We should also consider Section 2125, "When goods and other property shall be seized for any violation of this title, it shall be lawful for the person prosecuting on behalf of the United States to proceed against such goods and other property in the manner directed to be observed in the case of goods, wares or merchandise brought into the United States in violation of the revenue laws."

When goods are brought into the United States in violation of the revenue laws, they are usually seized upon warrant, but without warrant in case of emergency. The seizure is forthwith reported to the District Attorney, information is filed and notice given. The owner can appear and obtain possession of the property pending the trial by giving bond. A trial is had resulting in either the condemnation or release of the property. The owner has his day in court; the proceedings constitute due process of law.

Now we submit that with the exception of distilleries and intoxicating liquors, there is nothing in the Statute authorizing the seizure of property, except as a preliminary step to condemnation proceedings. In every instance, the property, when seized must be carried before the court to be proceeded against according to law, and as in the case of goods brought into the United States in violation of the revenue laws. Do the defendants propose to give to the appellants the benefit of a trial? Do they propose to establish any lien or lawful demand against

the cattle? No, they propose to arbitrarily seize the cattle and remove them beyond the reach of the only court having jurisdiction, a proceeding which does not collect the demand, but damages the cattle and spites the owner, and resembles malicious mischief rather than judicial process. If the defendants can justify their acts, their jurisdiction must be found in other sections of the law.

Sections 2147 and 2149 do not authorize the seizure and removal of cattle.

"Sec. 2147. The Superintendent of Indian Affairs and the Indian Agents and Sub-Agents shall have authority to remove from the Indian country all persons found therein contrary to law; and the President is authorized to direct the military force to be employed in such removal."

Sec. 2149. The Commissioner of Indian Affairs is authorized and required, with the approval of the Secretary of the Interior, to remove from any tribal reservation any person being therein without authority of law, or whose presence within the limits of the reservation may, in the judgment of the Commissioner, be detrimental to the peace and welfare of the Indians; and may employ for the purpose such force as may be necessary to enable the agent to effect the removal of such person."

These sections are to be strictly construed and by their express terms relate to persons and not to property. Other sections of the Statute relate to property, and define the penalty and procedure when it is unlawfully held or introduced into the Indian country. The section authorizing the officers in the Indian service to destroy a distillery would not justify the hanging of the distiller any more than these sections authorizing the removal of a person justify the seizure and removal of cattle. If the

law in reference to property be inadequate, Congress should be petitioned to supply the deficiency. Its supposed deficiencies can not be supplied by officers in the Indian service, for they do not, and can not have legislative power.

The question was expressly decided by the Court of Appeals for the Indian Territory in Buster & Jones vs. Wright, 69 S. W. 882, and practically decided in Kelly vs. Churchill, 69 S. W. 817. There is nothing to the contrary except the two opinions which we have picked up on our way to this Court.

The Court of Appeals for the District of Columbia declined to follow Buster & Jones vs. Wright, because they say it conflicts with Echols vs. Tate, 53 Ark. 12, Maxey vs. Wright, 54 S. W. 807, and Crabtree vs. Madden, 54 Fed. 426.

We can not see any conflict between Buster & Jones vs. Wright and Maxey vs. Wright. In the Maxey case, it was held that a person could be removed under Section 2147 or 2149. In the Buster & Jones case, the same judge held that these sections do not authorize the seizure of a stock of merchandise. Crabtree vs. Madden holds that the United States Courts in the Indian Territory do not have jurisdiction to entertain suits in behalf of the Indian tribes to collect their so-called taxes, and has no bearing whatever on the questions involved.

In Echols vs. Tate some goods had been removed from the Indian Territory to the State of Arkansas by the Indian Agent, and there attached by a creditor of the owner. A motion was made to quash the attachment because the goods had been fraudulently

brought within the jurisdiction of the court. The issue did not call for any serious consideration of Sections 2147 and 2149. If the agent acted in good faith, the removal was not fraudulent, though it may have been wrongful. The Court of Appeals seems to think that as the Statutes of Arkansas were subsequently put in force in the Indian Territory, the former decisions of the Supreme Court of Arkansas construing United States, not Arkansas Statutes, are entitled to peculiar weight. We do not think the premises justify the conclusion.

In order to understand just how well the Arkansas Supreme Court understood conditions in the Indian Territory, Carter vs. Good, 50 Ark. 719, should not be overlooked. There, while two citizens of Arkansas were journeying through the Indian Territory, one of them wrongfully appropriated the other's horse. After their return home, the owner sued the wrong-doer for the value of the horse. The Supreme Court held that he had no cause of action because the conversion took place in the Indian Territory.

The act of June 30th, 1834, to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, and the provisions of the treaties of 1855 and 1866 with the Choctaw and Chickasaw Indians relative to intruders, are not now in force in the Chickasaw Nation, or applicable to conditions existing there; but have been repealed by subsequent and inconsistent legislation.

So far we have treated the question as though the Act of June 30th, 1834, and the Treaties of 1855

and 1866 were in force. There are now within the Chickasaw Nation probably one hundred and fifty thousand white inhabitants and probably eight thousand persons claiming to be Indians, but half of them are of mixed blood, or what are known as 'intermarried citizens.' There are many towns and cities in the Chickasaw Nation incorporated under the laws of the United States in which under the 14th Section of the Curtis Bill all of the inhabitants, without regard to race, are entitled to equal rights privileges and protection. The Indians are citizens of the United States and qualified jurors in the federal courts, and compete with their white fellow citizens for the various federal offices. Practical partition has been made of the surface of the land. Each Indian is entitled to the use of his approximate share, with the right to lease it to whom he pleases, including white men. The inhabitants of the Chickasaw Nation, none of whom may be Indians, may incorporate for operating and maintaining therein electric roads, telephone and telegraph lines, bridges, turn-pikes, mining and manufacturing enterprises, banking, and the various other purposes for which it is usual to incorporate. 31 S. at L. 795, Sec. 8. Corporations chartered by other states may transact business in the Chickasaw Nation upon filing a power of attorney of South McAlester creating an agent with power to accept service. Members of the tribe are merchants and carry large stocks of clothing, hardware and other merchandise. The Indians and whites mingle in daily intercourse, and traffic and trade as in other sections of the Union. The

civil and criminal laws of the State of Arkansas have been put in force in the Chickasaw Nation, and all inhabitants, including Indians, are subject thereto. The tribal government has been stripped of about all of its power, even over the members of the tribe, and is merely continued in existence for the purpose of perfecting the allotment of lands. In most matters the United States deals directly with the individual Indian, and not with the so-called government. These are certainly conditions not contemplated by the Act of June 30th, 1834, or by the Treaties of 1855 and 1866.

In United States vs. Joseph, 94 U. S., 614, this Court in reaching the conclusion that the Pueblo Indians are not within the purview of the Act of June 30th, 1834, says, "The degree of civilization which they had attained centuries before, their willing submission to all the laws of Mexican Government, the full recognition by that government of all of their civil rights, including that of voting and holding office, and their absorption into the general mass of the population, (except that they held their lands in common) all forbid the idea that they should be classed with the Indian tribes for whom the Intercourse Acts were made; or that in the intent of the Act of 1851, its provisions were applicable to them. The tribes for whom the Act of 1834 was made were those semi independent tribes whom our government has always recognized as exempt from our laws, whether within or without the limits of an organized state or territory, and in regard to their domestic government left to their own rules and traditions; in

whom we have recognized the capacity to make treaties, and with whom the governments, State and National, deal with a few exceptions only in their national or tribal character, and not as individuals."

Every circumstance taking the Pueblo Indians from under the Act of June 30th, 1834, exists in a more marked degree in the Chickasaw Nation. If, under Section 2134, a foreigner should be prosecuted for travelling through the Chickasaw Nation without a passport, the District Attorney would be removed for incompetency, and justly so. If, under Section 2135, a white man should be prosecuted for swopping hats, coats or guns with B. H. Colbert, United States Marshal for the Southern District and an Indian, the District Attorney would render himself ridiculous. If, under Section 2138, the owner should be indicted for shipping his cattle from the Chickasaw Nation to the markets, the prosecution would be ridiculed out of court.

The Court of Appeals concedes that some of these provisions are not in force in the Chickasaw Nation, but says that other provisions are. All of the provisions of the Act of June 30th, 1834, were intended to be enforced in the Indian country, and if the Chickasaw Nation be Indian country within the meaning of one, it is Indian country within the meaning of all. In Benson vs. United States, 44 Fed. 180, Judge Wallace justly said, "Manifestly the term Indian country has the same meaning in each of these sections, consequently if the contention for the government is sound, every merchant of Salamanca and of the several other villages within the bounda-

ries of the Alleghany Reservation, every butcher, baker and candle-stick maker, and every foreigner who visits one of them, is a criminal and subject to severe punishment by fine and imprisonment by the laws of the United States."

In United States vs. Cisna, 1st McLean 254, it was held that the Act of June 30th, 1834, was intended to apply to a country inhabited almost exclusively by Indians, where there was but little, if any, intercourse by the Indians with white people; and of necessity could not, and did not apply in a country having a considerable white population, and in which the Indians and whites mingled, traded and trafficked in daily intercourse.

It must be conceded that a foreigner can not be prosecuted for travelling through the Chickasaw Nation without a passport, and that the owner of cattle does not commit a felony in shipping his property to the market. It must be conceded that a white man in the Chickasaw Nation may lawfully buy clothing, hardware, stoves and cooking utensils from an Indian merchant. If he should refuse to pay for them when bought, he could not avoid the debt by pleading that the purchase was in violation of law or against public policy. The defendants must concede this much. Yet, it is contended that in the incorporated cities of the Chickasaw Nation where the Constitution is in force and courts are sitting with jurisdiction to redress all grievances, the Indian office can extort money by threatening to kidnap a citizen, and can arbitrarily invade the home of a citizen, close his place of business and practically

confiscate his property. This is more absurd than the prosecution of a foreigner for travelling without a passport. It is contended that the Indian office can lawfully issue an order to a lieutenant of Indian police directing him to remove from the Chickasaw Nation all catttle held there in violation of the Act of May 3, 1902, specifying no particular cattle or the name of any owner, but leaving all these things to the discretion of the policeman. Now it is seriously contended that this is due process of law. It is also contended that the Interior Department can go into court and have the clerk enjoined from filing complaints in replevin, or issuing writs, and the marshal enjoined from executing the same; thus preventing the citizens from obtaining any relief against the threatened depredation of the policeman. Now it is claimed that the forced contribution of money by this method is due process of law. Justification for these acts can not be found in the right of Congress to regulate commerce with the Indian tribes. The Interior Department is not Congress. In regulating commerce with the Indian tribes, Congress must of necessity observe the other provisions of the Constitution. The same sentence confers upon Congress the right to regulate commerce with the several states, but in doing so, no man can be compelled in a criminal case to furnish evidence against himself in violation of another provision of the same instrument. Councilman vs. Hitchcock, 142 U. S. 547.

The same section confers upon Congress the right to exercise exclusive legislation in all cases whatsoever over the District of Columbia, but in so doing the other provisions must be observed, and no

one can be deprived of the right of a trial by jury in an action at law. Callan vs. Wilson, 127 U. S. 540. The same section confers upon Congress the right to lay and collect duties, imposts and excises, but in doing so Congress can not violate other provisions and require the defendant to furnish evidence against himself in an action to recover a penalty. Boyd vs. United States, 116 U. S. 610.

Sections 2147 and 2149 were evidently enacted upon the theory that the Constitution of the United States was not in force in what was meant by the term "Indian country." It was a wild, unsettled country beyond the outposts of civilization, to which the judicial arm of the government had never extended, and in which there was nothing to indicate the authority of the United States except here and there a military post. There were no courts in the country or civil officers, and it was impossible to give practical effect to the constitutional guaranties. Certainly it can not be successfully contended that in reference to all matters which Congress is authorized to do, the citizen can be arrested without warrant and transported and banished without hearing, and his property seized, damaged and removed at the pleasure of an executive officer.

It is the contention of the defendants that the Commissioner of Indian Affairs can, without hearing, send a policeman to seize and remove from the Indian Territory a reputable white citizen, and that the effect of this ex-parte proceeding is to deprive him of the right to ever return to the Indian Territory, and to subject him to a penalty of one thousand

dollars if he is ever found therein. They have arrested and removed, and thereafter sought to prosecute the mayors and aldermen of incorporated towns and the owners of town lots and other real estate. This, it is claimed, is due process of law.

It ought to be reasonably free from doubt that the provisions of the Treaties of 1855 and 1866 in reference to intruders have been repealed by subsequent and inconsistent legislation.

Ward vs. Race Horse, 163 U. S. 511.

The Cherokee Tobacco, 11 Wallace 616.

The policy as manifested by the Treaties of 1855 and 1866 was to prevent strife between the white man and the Indian by forcing them to live separate and apart. It was not contemplated that the Indian Territory should ever be incorporated into any state. It was unlawful for any white man to live in the Indian Territory, unless he was an officer or employee of the government, or came under some of the specified exceptions.

The policy of the government has since, from necessity, undergone a radical change. It is not now the policy of Congress to exclude white men from the Indian Territory; but it is the manifest policy of the government to admit the territory into the Union as a state at no distant day.

This policy is wholly inconsistent with the policy manifested by the old treaties. The Curtis Bill and the Atoka Agreement expressly provide for white people residing in the Chickasaw Nation. They are permitted to buy and to own land, to incorporate

towns, maintain municipal government, to levy taxes and to maintain public schools. Throughout the Curtis Bill and the Atoka Agreement white men are recognized as being lawfully in the Chickasaw Nation. If the consent of the Indians be necessary, that consent is given in the Atoka Agreement. If the Chickasaw Legislature should demand that the incorporated cities be abolished and the white inhabitants banished, would the government be under any treaty obligation to do so? There is nothing more absurd than the contention that all white men in the Chickasaw Nation, except government employees, are intruders, and must year by year obtain the consent of the Indians to their being there.

The only authority supporting the contention of the defendants is Maxey vs. Wright, 54 S. W. That was a somewhat unfortunate case. Mr. Maxey was an attorney residing is the City of Muskogee, and Mr. Wright, the Indian Inspector, threatened to remove him from the Indian Territory because he did not pay to the Creek Indians a tax which they demanded of him for practicing his profession in the courts of the United States. Mr. Maxey brought suit and prayed for an injunction to restrain the threatened arrest and removal, taking the position that he was an officer of the United States the same as the clerk, the marshal or the Judge. This was the only question which he discussed before the Court of Appeals. He waived the question as to the right of the Interior Department to collect the tax. The Court of Appeals affirmed the judgment of the trial court denying an injunction in an opinion that was principally dictum. The

case was appealed to the United States Court of Appeals for the Eighth Circuit, but it was there discovered that whatever might be the rights of Mr. Maxey, a writ of injunction was not his remedy, and the judgment for that reason was affirmed in an oral opinion. This is briefly the history of the case of Maxey vs. Wright.

In the opinion, the court speaks of Sections 2147 and 2149 as remedies for the collection of tribal taxes, but we think the court mistook the purpose of Congress in the enactment of these provisions. Section 2149 is at least of questionable constitutionality, and was not intended to be invoked except in case of emergency. Congress did not intend it to be used for the collection of debts. For the Commissioner to profess to believe that the failure to pay a few dollars renders the white man's presence detrimental to the peace and welfare of the Indians, and to change his mind when the money is paid, is to trifle with the Statute. Congress did not intend that officers in the Indian service should threaten to arrest and remove people in order to extort money; or that the officers should collect money from the white inhabitants of the Indian Territory. That would inevitably lead to dishonesty, extortion, embezzlement and all manner of crookedness.

The Chickasaw Statute of May 3rd, 1902, provides that the net proceeds shall be paid quarterly to the Treasurer of the Tribe. Now who is to be the judge of the expenses? What compensation are the various men to receive, who look after the collection of these so-called taxes? We find that one man calls

himself United States Internal Revenue Inspector, another calls himself Deputy United States Revenue Collector, and so on through the list. These officers are no where mentioned in the Statute, and their compensation is not fixed by law. They can fix their compensation at whatever they please. Does the law contemplate that the Secretary of the Interior, or any officer under him, should thus constitute himself tax collector for the Chickasaw Nation, fix his own compensation and be the exclusive judge of his expenses? As private citizens, they might take a contract to collect taxes for the Indian tribes; but as officers of the United States, they can not do so, for the Statute nowhere imposes that duty upon them.

It is respectfully submitted that the threatened acts are illegal and wrongful, and should be enjoined.

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